

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NANCY HYDER,

Plaintiff,

v.

KEMPER NATIONAL SERVICES, INC.,
LUMBERMAN'S MUTUAL INSURANCE CO.,
BROADSPIRE SERVICES, INC., VODAFONE
AMERICAS, INC., VODAFONE AMERICAS,
INC., SHORT TERM DISABILITY PLAN,
VODAFONE AMERICAS, INC., LONG TERM
DISABILITY PLAN, VODAFONE EMPLOYEE
HEALTH PLAN, VODAFONE EMPLOYEE DENTAL
PLAN, VERIZON WIRELESS, INC., and
DOES 1 TO 50, inclusive,

Defendants.

No. C 05-1782 CW

ORDER GRANTING
PLAINTIFF'S
MOTION FOR
ATTORNEY'S FEES

Plaintiff Nancy Hyder moves for attorney's fees in the amount of \$95,540 from Defendants Kemper Insurance Co., Lumberman's Mutual Insurance Co., and their successor-in-interest Broadspire Services, Inc., (collectively, Insurance Defendants) and Vodafone Americas, Inc., Long Term Disability Plan, and Vodafone Americas, Inc., Short Term Disability Plan (collectively, Disability Plan Defendants).

1 Defendants oppose the motion.¹ The matter was submitted on the
2 papers. Having considered all of the papers filed by the parties,
3 the Court grants Plaintiff's motion.

4 BACKGROUND

5 On April 29, 2005, Plaintiff filed suit alleging five causes
6 of action arising from denials of disability benefits, stock
7 options and retiree health and dental coverage. Her complaint
8 included claims against Insurance Defendants, Disability Plan
9 Defendants, Vodafone Americas, Inc., Vodafone Employee Health Plan,
10 Vodafone Employee Dental Plan and Verizon Wireless. Against
11 Insurance Defendants, Plaintiff brought claims of (1) breach of the
12 duty of good faith and fair dealing and (2) breach of contract. In
13 the alternative, Plaintiff brought a claim against Disability Plan
14 Defendants and Insurance Defendants for (3) denial of benefits in
15 violation of the Employee Retirement Income Security Act (ERISA),
16 29 U.S.C. § 1132. Plaintiff also brought claims (4) against
17 Vodafone for breach of contract based on the denial of stock
18 options and (5) against Vodafone Employee Health Plan, Vodafone
19 Employee Dental Plan and Verizon Wireless, Inc., for denial of
20 benefits due under an ERISA plan, 29 U.S.C. § 1132(a)(1)(B) and
21 (c)(1).

22 On June 29, 2005, the Court granted Insurance Defendants and
23 Disability Plan Defendants' motion to dismiss the first and second
24 causes of action, finding that they were preempted by ERISA. On
25 June 30, 2006, the Court denied Insurance Defendants and Disability

26 ¹In this order, all references to "Defendants" apply to the
27 Insurance and Disability Plan Defendants only.

1 Plan Defendants' motion for summary judgment and granted
2 Plaintiff's cross-motion for partial summary judgment on her third
3 cause of action. The Court found that Plaintiff was entitled to
4 benefits under both the Long Term and Short Term Disability Plans.
5 On October 11, 2006, the Court entered an order awarding Plaintiff
6 \$29,689.49 in net short-term disability back benefits, \$332,457.93
7 in net long-term disability back benefits, \$5,597 per month in on-
8 going long-term disability benefits and pre-judgment interest to be
9 compounded monthly at the rate described in Title 28 U.S.C.
10 § 1961(a). The relevant parties settled the remaining claims and
11 the Court entered judgment on April 18, 2007.

12 Plaintiff now moves to recover \$95,540 in attorney's fees. In
13 support of the motion Plaintiff submits the declaration of her
14 attorney, Richard Johnston, detailing the hours he spent on the
15 case and requesting remuneration at the rate of \$425 per hour, his
16 current rate for ERISA matters. Mr. Johnston's declaration
17 indicates that he has significant experience in ERISA litigation.

18 DISCUSSION

19 I. Attorney's Fees Under ERISA

20 ERISA provides that "the court in its discretion may
21 allow a reasonable attorney's fee and costs of action to either
22 party." 29 U.S.C. § 1132(g)(1). The Ninth Circuit has adopted a
23 five-part test to determine whether attorney's fees should properly
24 be awarded under ERISA: (1) the degree of the opposing party's
25 culpability or bad faith; (2) the ability of the opposing party to
26 satisfy an award of fees; (3) whether an award of fees against the
27 opposing party would deter others from acting in similar

1 circumstances; (4) whether the party requesting fees sought to
2 benefit all participants and beneficiaries of an ERISA plan or to
3 resolve a significant legal question regarding ERISA; and (5) the
4 relative merits of the parties' positions. Hummell v. S.E. Rykoff
5 & Co., 634 F.2d 446, 453 (9th Cir. 1980). No one of these Hummell
6 factors is decisive, and some may not be pertinent in a given case.
7 Smith v. CMTA-IAM Pension Trust, 746 F.2d 587, 590 (9th Cir. 1984);
8 Carpenters' S. Cal. Admin. Corp. v. Russell, 726 F.2d 1410, 1416
9 (9th Cir. 1984). The Hummell factors "reflect a balancing" and not
10 all factors must weigh in favor of a fee award. McElwaine v. U.S.
11 West, Inc., 176 F.3d 1167, 1173 (9th Cir. 1999).

12 The Ninth Circuit has stated that when applying the Hummell
13 factors, a district court "must keep at the forefront ERISA's
14 remedial purposes that 'should be liberally construed in favor of
15 protecting participants in employee benefit plans.'" Id. at 1172
16 (citing Smith, 746 F.2d at 589). The court should consider ERISA's
17 purpose "to protect employee rights and to secure effective access
18 to federal courts." Smith, 746 F.2d at 589. Finally, a motion for
19 attorney's fees in an ERISA case requires application of a "special
20 circumstances" rule under which a successful ERISA participant
21 "should ordinarily recover fees unless special circumstances would
22 render such an award unjust." Elliott v. Fortis Benefits Ins. Co.,
23 337 F.3d 1138, 1148 (9th Cir. 2003) (citing McElwaine, 176 F.3d at
24 1172).

25 Plaintiff argues that the five Hummell factors weigh in favor
26 of awarding attorney's fees and that there are no special
27 circumstances which would render an award unjust. Defendants argue
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1 that the Hummell factors do not support an award of attorney's fees
2 in this case, but do not argue that special circumstances exist or
3 apply. The Court discusses each factor in turn.

4 A. Bad Faith or Culpability

5 Plaintiff argues that Defendants' decision to deny her
6 benefits "was characterized by bad faith and demonstrated
7 significant culpability." Plaintiff's Motion at 7. For example,
8 Plaintiff notes that Defendants never responded to her letter
9 indicating that her appeal was timely. In addition, Plaintiff
10 points out that Defendants informed her that they were
11 investigating her disability status, but later denied her
12 application for short-term disability benefits as untimely and
13 therefore denied her long-term disability benefits because she had
14 not received short-term benefits. As the Court stated in its order
15 granting Plaintiff's motion for partial summary judgment,
16 Defendants' communication with Plaintiff contained unexplained
17 "irregularities and inconsistencies." June 30, 2006 Order at 18.

18 Defendants counter that the Court never found that their
19 arguments were made in bad faith and that two of the three claims
20 against them were dismissed. However, the Ninth Circuit has held
21 that while "bad faith is a factor that would always justify an
22 award, it is not required." Smith v. CMTA-IAM Pension Trust, 746
23 F.2d 587, 590 (9th Cir. 1984). Further, that two of the three
24 claims against Defendants were dismissed because they were
25 preempted by ERISA says nothing about Defendants' culpability.

26 This factor weighs in favor of awarding attorney's fees.
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1 B. Ability to Pay

2 Defendants do not contest that they are able to satisfy a fee
3 award. This factor accordingly weighs in favor of awarding
4 attorney's fees to Plaintiff. According to Smith, absent special
5 circumstances, a prevailing ERISA employee should ordinarily
6 receive attorney's fees from the defendant based on this factor
7 alone. 746 F.2d at 590.

8 C. Deterrence

9 Plaintiff argues that an award of attorney's fees will
10 dissuade Defendants from denying benefits in the same confusing and
11 inconsistent manner in future cases. Defendants argue that because
12 the denial was based on a simple timing issue, unique to
13 Plaintiff's case, there is no possibility for deterrence in the
14 future. However, in granting Plaintiff's motion for partial
15 summary judgment, the Court found the application of the time bar
16 was unreasonable with respect to the Short Term Disability Plan
17 because Defendants had not supplied Plaintiff with plan documents
18 and because she received misleading information from her employer.
19 Further, the Court found that the time bar was not enforceable with
20 respect to the Long Term Disability Plan because of the misleading
21 nature of Defendants' communications with Plaintiff.

22 Because an award of attorney's fees would deter Defendants
23 from unreasonably imposing the time bar in future cases, this
24 factor weighs in favor of awarding attorney's fees.

25 D. Benefit

26 Plaintiff acknowledges that the result in this case primarily
27 benefits herself, but argues that the Court's finding that
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1 Defendants acted unreasonably and unfairly will help future
2 claimants. There may be some benefit to other plan participants in
3 ensuring that Defendants do not improperly invoke the time bar.

4 This factor weighs in favor of awarding attorney's fees.

5 E. Relative Merits of the Parties' Positions

6 Plaintiff argues that the fifth factor weighs heavily in her
7 favor because the Court decided in her favor that Defendants
8 wrongfully denied her benefits. Defendants do not dispute
9 Plaintiff's argument.

10 Based on the Court's judgment in favor of Plaintiff, the Court
11 finds that the fifth factor weighs in favor of awarding attorney's
12 fees. See Smith, 746 F.2d at 590 ("The fifth Hummell factor, the
13 relative merit of the parties' positions, is, in the final
14 analysis, the result obtained by plaintiff.").

15 All the Hummell factors weigh in favor of awarding Plaintiff
16 attorney's fees in this case.

17 II. Fee Calculation

18 In the Ninth Circuit, reasonable attorney's fees are
19 determined by first calculating the "lodestar." Jordan v.
20 Multnomah County, 815 F.2d 1258, 1262 (9th Cir. 1987). "The
21 'lodestar' is calculated by multiplying the number of hours the
22 prevailing party reasonably expended on the litigation by a
23 reasonable hourly rate." Morales v. City of San Rafael, 96 F.3d
24 359, 363 (9th Cir. 1996). There is a strong presumption that the
25 lodestar figure represents a reasonable fee, Jordan, 815 F.2d at
26 1262; however, the district court may adjust the award from the
27 lodestar figure upon consideration of additional factors that may
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1 bear upon reasonableness. Kerr v. Screen Guild Extras, Inc., 526
2 F.2d 67, 70 (9th Cir. 1975).

3 Determining a reasonable hourly rate is a critical inquiry.
4 Jordan, 815 F.2d at 1262 (citing Blum v. Stenson, 465 U.S. 886, 895
5 n.11). In establishing the reasonable hourly rate, the district
6 court should take into account (1) the novelty and complexity of
7 the issues, (2) the special skill and experience of counsel,
8 (3) the quality of representation, (4) the results obtained,
9 Cabrales v. County of Los Angeles, 864 F.2d 1454, 1464 (9th Cir.
10 1988), and (5) the contingent nature of the fee agreement. City of
11 Burlington v. Dague, 505 U.S. 557, 562-63 (1992). These factors
12 are subsumed in the initial lodestar calculation, and should not
13 serve as independent bases for adjusting fee awards. Morales, 96
14 F.3d at 363-64. Reasonable fees are generally calculated according
15 to the prevailing market rates in the forum district. Gates v.
16 Deukmejian, 987 F.2d 1392, 1405 (9th Cir. 1992).

17 The Supreme Court has recognized that, while it is appropriate
18 for the district court to exercise its discretion in determining an
19 award of attorney's fees, it remains important for the court to
20 provide "a concise but clear explanation of its reasons for the fee
21 award." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Hall v.
22 Bolger, 768 F.2d 1148, 1151 (9th Cir. 1985) (in computing an award,
23 the district court should provide a "detailed account of how it
24 arrives at appropriate figures for 'the number of hours reasonably
25 expended' and 'a reasonable hourly rate'") (quoting Blum, 465 U.S.
26 at 898).

27 Defendants argue that Plaintiff's request for fees is
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1 excessive because both the \$425 hourly rate and the number of hours
2 claimed are too high.

3 A. Hourly Rate

4 Plaintiff submits the declaration of Daniel Feinberg, an ERISA
5 attorney practicing in the area whose hourly rate is \$575.

6 Feinberg Declaration ¶ 8. Since 1988, Feinberg has represented
7 Plaintiffs. Feinberg declares that he believes his rate is
8 reasonable and within market rates for ERISA specialists at his
9 experience level. Id. In 2006, Feinberg was awarded fees at the
10 hourly rate of \$495 for work performed on a case between 2004 and
11 2006. Id.

12 Plaintiff's counsel in this case declares that he has
13 practiced primarily in the fields of insurance and benefits law
14 since graduating from law school in 1986. Johnston Declaration at
15 ¶ 6. He previously defended ERISA plans and now represents
16 plaintiffs in ERISA cases. Id. Since February, 1999, counsel has
17 "maintained a solo practice dedicated significantly to the
18 representation of claimants in ERISA cases." Id. He states that
19 \$425, the rate he requests, is his "current rate for ERISA matters,
20 and is based on [his] evaluation of the current state of the market
21 for lawyers of [his] experience and qualifications." Id.

22 In addition, Plaintiff cites recent cases from this district,
23 awarding fees in ERISA cases at hourly rates from \$395 to \$495 per
24 hour. See, e.g., Farhat v. Hartford Life Acc. Ins. Co., 2006 WL
25 2521571 at *8 (N.D. Cal.) (awarding at rate of \$435 per hour and
26 citing cases awarding up to \$495 per hour); Fleming v. Kemper
27 Nat'l, 373 F. Supp. 2d 1000, 1012 (N.D. Cal. 2005) (\$450 per hour).

1 Where Plaintiff has provided evidence "'regarding prevailing
2 fees in the community, and rate determinations in other cases,' the
3 Ninth Circuit has implied that defendants cannot simply disagree
4 with this evidence, but should 'support their arguments with any
5 affidavits or evidence of their own regarding legal rates in the
6 community.'" Farhat, 2006 WL 2521571 at *7 (citing United
7 Steelworkers of America v. Phelps Dodge Corp., 896 F.2d 403, 407
8 (9th Cir. 1990)).

9 Defendants have not done so. Instead, Defendants argue that
10 Albion Pacific Property Resources v. Seligman, 329 F. Supp. 2d
11 1163, 1167 (N.D. Ca. 2004), limits the attorney's fees claim to
12 only the rate charged by "reasonably competent counsel." However,
13 Albion and the other cases Defendants cite in support of this
14 argument are not ERISA cases. In a recent ERISA case, the Ninth
15 Circuit held that "billing rates should be established by reference
16 to the fees that private attorneys of an ability and reputation
17 comparable to that of prevailing counsel charge their paying
18 clients for legal work of similar complexity." Welch v. Metro.
19 Life Ins. Co., 480 F.3d 942, 946 (9th Cir. 2007) (internal
20 quotations omitted); see also, D'Emanuele v. Montgomery Ward & Co.,
21 904 F.2d 1379, 1384 (9th Cir. 1990).

22 Therefore, Plaintiff's counsel's fees will be awarded at a
23 rate of \$425 per hour.

24 B. Number of Hours

25 Plaintiff's counsel states in his sworn declarations that he
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1 has spent 224.8 hours on this case.² Defendants contest the
2 request for fees for the 22.6 hours Plaintiff's counsel spent on
3 the state causes of action that were dismissed as preempted by
4 ERISA. In addition, Defendants contest the 0.3 hours counsel
5 attributes to a jury demand because ERISA does not allow for a
6 jury.

7 In her opposition to the motion to dismiss, Plaintiff argued
8 that the two state law claims against Insurance Defendants were not
9 preempted because ERISA only preempts cases against benefit plans
10 themselves. The Court concluded that those claims were preempted
11 and granted Defendants' motion to dismiss. Nonetheless, as
12 Plaintiff points out, the Ninth Circuit has held that in applying
13 29 U.S.C. § 1132(g), the ERISA attorney's fees provision, "the
14 Hummell factors should be 'liberally construed in favor of
15 protecting participants in employee benefits plans.'" Elliot, 337
16 F.3d at 1148 (quoting McElwaine, 176 F.3d 1167, 1172 (9th Cir.
17 1999)). Therefore, the Elliot court affirmed the district court's
18 award of fees, including fees for time spent on state law claims
19 that were found to be preempted.

20 As discussed above, all of the Hummell factors weigh in favor
21 of awarding Plaintiff attorney's fees. Further, the Ninth Circuit
22 has also held that where "claims upon which the plaintiff failed to
23 prevail were related to the plaintiff's successful claims," the
24 Court should "evaluate[] the 'significance of the overall relief
25 obtained by the plaintiff in relation to the hours reasonably

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27 ²This includes 10.6 hours spent on Plaintiff's reply to the
28 opposition to this motion for attorney's fees.

1 expended on the litigation.'" Thorne v. City of El Segundo, 802
2 F.2d 1131, 1141 (9th Cir. 1986) (quoting Hensley v. Eckerhart, 461
3 U.S. 424, 435 (1983)). If the Court finds that Plaintiff has
4 achieved "'excellent results' full compensation may be appropriate,
5 but if only 'partial or limited success' was obtained, full
6 compensation may be excessive." Id. Such decisions are within the
7 Court's discretion. The Court finds that Plaintiff has achieved
8 "excellent results." As a result of this action, she is entitled
9 to significant back benefits as well as prospective benefits.
10 Therefore, an award of fees for the full 224.8 hours of Plaintiff's
11 counsel's time is appropriate.

12 CONCLUSION

13 For the foregoing reasons, the Court GRANTS Plaintiff's motion
14 and awards her \$91,035 in fees to be paid jointly and severally by
15 the liable Defendants forthwith.

16 IT IS SO ORDERED.

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18 Dated: 6/14/07



19 CLAUDIA WILKEN
20 United States District Judge
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